9-6-2011

# Kendall v. Orthman Appellant's Reply Brief Dckt. 38397

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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| CHARLES KENDALL,<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>NANCY ORTHMAN,<br><br>Defendant/Respondent. | **DOCKET NO. 38397-2011**<br>CASE NO. CV 2009-308<br><br>APPELLANT REPLY BRIEF |

# APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka, Honorable Jonathan P. Brody, District Judge, presiding.


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## STATEMENT OF THE CASE

For convenience in this brief, the Plaintiff and Appellant shall be referred to as Charles or Appellant, and the Defendant and Respondent shall be referred to as Nancy or Respondent.

## NATURE OF CASE

This is a classic case of unjust enrichment. Charles and Nancy began living together, in a non-marital arrangement sometime in late 1999 or early 2000. In December 2000, Nancy purchased significantly rundown piece of land, located on an unimproved road, 8 miles out of Paul, Idaho, which had a modular home on it for the purchase price of $59,000.00, after closing costs, $62,522.79. The parties continued to cohabitate until April of 2006. During this time, while Nancy made the mortgage payments and worked on the home, Charles made significant improvements to the land solely at his own expense. Not only did he clean up the property, he dug water lines and electrical lines, he rebuilt broken fences, created a usable irrigation system and planted pastures. Charles, most importantly, erected a barn and corrals on the property, which were used by Nancy and her children as well as Charles, and which became the primary attraction and improvement that sold the property.

In 2009 Nancy sold the property for more than double what she paid for it. The purchase price was $130,000.00. The net return was $62,545.40. The purchasers, Mr. and Mrs. Pereira both testified that the barn and the corrals were the primary reason they bought this property.

## STATEMENT OF FACTS

Appellant, in this cause, plead and with reasonable certainty proved that the respondent received benefits, conferred upon her by appellant , which it would be unjust for her to retain. Appellant's theory was that Respondent was unjustly enriched by improvements made upon property owned her during the period of their non-marital cohabitation.

Although the defense in this cause gave lip service to the unjust enrichment theory of appellant, the underlying theory of the defense was that this was Respondent's Property, common law marriage had been abolished in Idaho, therefore, Appellant could acquire no claim against her.

Appellant raised this issue in argument, in the trial court.. The argument was ignored . However, the findings of fact, which were written by counsel or the defense, rubberstamped and adopted as the decision of the court largely reflect the defenses underlying theory. The real essence of the decision of the lower court is that in the State of Idaho, parties to a non-marital relationship have no equitable claim for money, materials, work and improvements made to the separate property of the other from which the property owner is enriched by the benefits conferred. We endeavor to point this out more fully the argument that follows.

Repondent's statement of facts requires additional clarification.

When distinguished between evidence which is relevant to the facts relating to the unjust enrichment claim from those which support the theory of the defense f the pertinent facts in this case are quite clear. The relevant facts are summarized above and are basically uncontested or undisputed.

Defense places great weight on Lloyd Smith's testimony. Smith's opinion that he could have sold the property for the same amount without the barn is rebutted by the facts of the case: Contrary to that opinion, Mr. Smith also testified that he set up the advertising for this property (Pl. Exh 3(a) .We attach as a photo copy of Pl. exhibit 3(a) for convenience of the court. Lloyd then testified, in essence, that the barn and corrals had nothing to do with the sale of the property, it was just "available to be used for marketing:" (Tr. p. 300, L 25), This, however, is contrary to the evidence and testimony of the buyers – Pereiras. Who bought the property only because of the barn and improvements. The facts demonstrate Smith's opinion testimony was of no value. He deals in advertising and selling the property to people looking for horse property overshadow his effort to assist his client.

In a similar vein, Nancy argues that she did not ask Charles to build the barn and corrals on her property, and "she did not acquiesce in the construction of the horse barn until the Plaintiff wore down her resistance by repeated insistence." (Tr. p. 240, L. 20-24). Her testimony is not consistent on this point as is shown later in argument herein. Here again, in order to recover for unjust enrichment, it is not necessary that Nancy have asked Charles to build the barn. Nancy admitted she consented and that she helped him put some of the rafters up and some of the rolls for the roof on. She and her children used the barns, corrals and pastures for their miniature horses, turkeys, sleighs, and riding horse that Charles brought for the children to ride. etc. (Tr. p. 331, L. 21; 332, L. 20; p.333, L. 8-21)

"The Plaintiff was a self-employed farrier." (Tr p. 330, L. 1-25) It must be asked to what issue is this relevant? Being a farrier is a well known, legitimate profession. (Tr.

p. 172, L. 11-13) "He did not file income tax returns." (Tr p. 243, L. 3-23) Again one must question what that has to do with whether Nancy was unjustly enriched. "He had a passion for chariot racing as a hobby." (Tr p. 124, L. 4-7) And once again, what does this have to do with unjust enrichment? During their association, Nancy also developed "a passion for chariot racing" in that she attended the chariot races with him on Saturdays and so did one of her sons. (Tr. p. 30, L. 3-18). The last line of that paragraph was: "and he dreamed of owning his own horse barn to support his activity." That statement, once again has nothing to do with the elements of this case. Additionally it ignores the fact that Charles had adequate horse facilities at his parent's farm only a mile and a half away. Its sole purpose was to make it look like Charles was some kind of freeloader, intent on forcing his dreams and passions on others. In fact, Nancy testified that she and children not only helped some with the building of the barn, but that she hoped to have calves there and raise calves. (Tr. p. 333, L. 8-9) She admitted that the barn and corrals were useful to her with her ponies and her children's 4-H turkey projects. (Tr. p.333, L 12-21; p. 340, L. 18-21; p. 342, L. 1-22) and the horse she bought in joint venture with Mr. Schultz., and others.

At trial, but not before or during construction of the barn and corrals, Nancy was critical of Charles because he used some recycled and used materials in the construction of the barn and corrals. She said they were not: "esthetically pleasing to her." (Tr. p. 335, L7-8). That she was esthetically displeased does not prove she did not benefit from the improvement at the time of sale. Or that she was not unjustly enriched by it.

In this case, the barn and corrals were the enticement that sold the property to the buyers. Nancy testified: "Q. But when it came to the time of sale it was the barn that

influenced the buyer, right? A. That's what they testified to, but they're horse people. That was their main objective was that it housed their horses adequately." (Tr. p335, L. 20-24). In the same paragraph, counsel for Nancy makes the statement that the quality of workmanship and materials was substandard. This does not prove she was not unjustly enriched. It only proves that if the workmanship and materials were as the defense wished them to be, she would have possibly been enriched even more. In short, this is a complaint that she did not get quite enough.. That was Nancy's opinion, but again, even she admitted it was adequate to house the buyer's horses. Her testimony was over shadowed by the independent testimony of Dr. Tom Blaney, a veterinarian, who testified he had been in the barn about 6 times and that in his opinion the barn was: "average to above average for this area." (Tr. p. 168, L. 13). Monty Arrossa, the Director of Human Resources for the College of Southern Idaho, and owner and operator of Monty Arrossa Racing Stables, an award winning horse trainer, testified that the barn was extra roomy, safe, well ventilated and well lit. (Tr. p. 173, L. 18-21). He further testified that he would have no problem at all in putting his $30,000.00 to $50,000.00 racing horses in this barn. (Tr. p. 173, L. 6-11). In fact, his exact words were: "I wouldn't be afraid to put one of my very best horses in that barn." (Tr. p. 173, L. 9-11). He testified further, on the same page, that he couldn't tell that some of the materials used to build the barn had been salvaged. Lloyd Smith in his advertisement thought it important enough to photograph the interior of the Barn and include in his advertising.(PL. Exh. 3(a).

Of course, the truly relevant testimony on this issue was that of the purchasers of the property, the Pereiras. The Pereiras had absolutely nothing to gain or loose from their testimony at this trial. Mrs. Pereira testified: "We weren't just looking for a place for

ourselves, but also a place to have some livestock. A small acreage. And Tony was really excited by the horse barn in particular." (Tr. p. 39, L. 18-21). In response to the question of whether they would have bought the property without the barn and corrals and other improvements was: "No, and definitely not for the price that we did." (Tr. p. 41, L. 19). Mr. Pereira testified that the barn was an important as the house to his decision to purchase Nancy's property. He said: Well, it was equally important that we have not only somewhere to live, but also we have somewhere to keep our livestock. That wasn't something we were willing to give up. For the price, we could have bought a much nicer house, like in town or something, but that was not what was important for us. We also wanted a place to keep our animals." (Tr. p. 42, L. 21-25, p. 43, L 1-2.). When asked about the condition of the barn when they purchased the property, Mr. Pereira testified: It was in pretty good shape. I don't think we've done a lot to it." (Tr. p.44, L. 2,3).

In her brief, Nancy states that she "had grown tired of supporting Plaintiff's racing habit." Again, empty rhetoric in an effort to misdirect this Court from the true and relevant facts of this case. There was no evidence, whatsoever that Charles had a "racing habit". In contrast to the above, the evidence in this case creates an inference that after all the improvements were made and the work was done, Nancy saw an opportunity to profit from the sale of the property and she decided to terminate the relationship and move on.. The parties did have a dispute in 2006. Nancy decided to terminate Her original agreement with Charles that he need not pay utilities , etc., and to require him to pay the water bill, which resulted in Charles moving out of the home, but Nancy herself said that: "After a few days he calmed down, paid my water bill, and I said, ""You know,

you've got chariot season coming up and I know that you're going to need a place to train..."" (Tr. p 343, L. 16-18.). In any event, what about this exchange is relevant to the issue now before this court?

Nancy's brief also makes several irrelevant comments intended to make it look like Charles was living off Nancy's income. She admitted Charles worked throughout the period of their cohabitation. He paid about ½ of the grocery bill for 5 people, He testified he spent an average of $600.00 per month. He spent about everything he earned on the place and the Family ( SP. 217,L 9-18;Tr. P 125, L 23-25;P.126, L1-3) Nancy testified he was: "always doing things" for her (Tr. p. 327, L 12-16). But again, it must be asked, how is this relevant? These two began cohabitating and it must be recognized in this mainspring of human experience that in any such relationship, marriage or otherwise may not result in a completely equal contribution by one of the parties. Again, even if he were, what relevance to the case at hand does that have? Nancy's own testimony was that: "When I allowed Chuck to move in with me at the new home, I made it clear to him that he wasn't to pay any of the utilities. ... He wasn't expected to pay any utilities because I, being independent, wanted it clear that I didn't need him there. And this was my independent act and he didn't object to that." (Tr. p. 328, L. 13-20). Nancy further admitted that as far as she knew, Charles was working all the time they were together and that Charles did buy groceries for her and her family and that "Chuck was always doing things for me." (Tr. p. 327, L. 12-14).

At the risk of belaboring the point, it does seem obvious that the inflammatory rhetoric, and snide innuendo employed by Nancy, although not relevant to the case before the court, obviously had a profound impact on the trial Judge in this matter. These types

of disparaging language, although not relevant or competent, are found throughout the Findings of Fact and Conclusions of Law.

## ARGUMENT

### I

### DEFENDANT IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL .

In order to recover Attorneys Fees in this matter, this appeal must have been pursued frivolously, unreasonably and without foundation. Section 12-121 Idaho Code and Rule 54(e)(3)(1). "Since the statutory power is discretionary, attorney fees will not be awarded as a matter of right. Nor will attorney fees be awarded where the losing party brought the appeal in good faith and where a genuine issue of law was presented. In normal circumstances, attorney, attorney fees will only be awarded when this court is left with the abiding belief that the appeal was brought, pursued, or defended frivolously, unreasonably or without foundation." *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979).

Nancy's request for Attorneys fees presumes this court will ignore the arguments of appellant. Appellant's contentions are not frivolous, and this appeal is not brought unreasonably and without foundation. Attorney's fees should not be awarded unless this Court is left with an abiding belief to the contrary. *Minich*, Id.

Nancy's brief cites the case of *Excell Leasing v. Christensen*, 115 Idaho 708, 769 P.2d 585 (Ct. App. 1989) in support of her request for attorney fees on appeal. In the case, Christensen, unlike this case, failed to present a significant issue of law, and "no

findings of fact by the district court were clearly or arguably unsupported by substantial evidence." Id at p. 589.

The focus of the *Christensen* argument was the application of settled law to the facts. In the arguments to follow, we will endeavor to clarify and amplify Charles' contentions upon the foregoing.

II.

.THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECISION OF THE COURT WAS WRITTEN BY DEFENSE COUNSE, RUBBER STAMPED BY THE COURT.AND ADOPTED AS HIS OWN.

At the conclusion of trial, the court order counsel for the parties to submit proposed findings of fact. Both counsel submitted proposed findings of fact. The Court rubberstamped, verbatim, the proposed findings of defense counsel and adopted them as his decision. After reviewing the opening statement of Respondent it is appropriate to inquire, "why did we even spend two days in trial when the findings could have been written by the Defendant after her counsel's opening statement?

This court has held, the proper procedure for the court in such case is to use both drafts of the findings in preparing his finding of fact and conclusions of law. *Compton v. Gilmore* 98 Idaho 190, 193, 560 P2d. 861, 864 (1977); *Pline v. Asgrow Seed Co.* 102 Idaho 827, 642 P2d 64 (Ida. App. 1982)

Because this court has held, such procedure, although disfavored, is not reversible error if the findings essential to the decision are supported by substantial, competent evidence, though conflicting, we are put to the task of demonstrating to the court, the essential facts in this cause are either clearly erroneous or are arguably unsupported by

substantial competent evidence, or that as found, as we have contended in Appellant's opening brief, the Court has misapplied the law to those facts found which are essential to the decision.

III

STANDARDS OF REVIEW

Rule 52(a) of the Idaho Rules of Civil Procedure provides in relevant part: "...Findings of Fact shall not be set aside unless clearly erroneous. In the application of this principle regard shall be given to the special opportunity of the trial court to judge the credibility of those witnesses who appear personally before it. ..."

The substantial, competent evidence standard applied by the courts in determining whether findings of fact are supported or are clearly erroneous, requires an inquiry into the quantification and the qualification of the relevant evidence.

Evidence is said to be substantial if a reasonable trier of fact would accept and rely upon it in determining whether a disputed point of fact has been proven. *Williamson et. ux, et al v. City of McCall, 135 Idaho 452, 19 P.3d 766, (Idaho 2001) Christiansen v. Nelson, 125 Idaho 663, 873 P2d 917, (Idaho App. 1994); PFC Inc v. Rockland Telephone Co. 121 Idaho 1036, 829 P2d 1385 ( Idaho App. 1992); Ortiz v. Department of Health and Welfare, 113 Idaho 682, 747 P.2d 91 (Idaho App. 1987* Substantial and competent evidence is held to be relevant evidence that a reasonable mind might accept to support a conclusion. *Uhl v. Ballard Medical Product Inc*, 1138 Idaho653 , 657, 67 P3rd 1265 (2003) ;*White v,. Canyon Co. Highway Dist.* 139 Idaho 939, 86 P33rd 758 *(2004)*

I .R.E rule 401 defines relevant evidence as " evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"

Although we have found no Idaho case that has stated so, it is assumed that the reasonable man standard referred to in the above cases is an objective, not a subjective standard.

The United States Supreme Court has held that a finding of fact to which the clearly erroneous provision of rule 52(a) applies, is based upon the "fact finding tribunal's experience with the mainsprings of human conduct. to the totality of the facts of each case." *U.S. v. U.S. Gypsum Co, 333 U.S. 364, 395, 68 S.Ct 1190; Commissioner of Internal Revenue v. Duberstein*, 80 S.C. 1190, 363 U.S. 278; *Lundgren v. Freeman*, 307 Fed.2d 304.(U.S. C A, 9th Cir.(1962).

However, where the record does not contain sufficient evidence to sustain the trial court's findings, the Appellate Court should set them aside. *Ballard v. Lava Hot Springs Resort, Inc.* 97 Idaho 572, 548 P.2d 72 (Idaho, 1976). When the findings of the Trial Court are clearly erroneous and against the weight of the evidence, such finding will not be upheld on appeal...Likewise, where the evidence is not conflicting and produces only one conclusion, a finding by the trial court contrary to the evidence will be set aside on appeal. *State of Idaho ex rel. Wayne L. Kidwell v. Mater Distributors, Inc.*, 101 Idaho 447, 615 P2d 116 (Idaho 1980).

Obviously, to determine whether there is substantial evidence, competent evidence the reviewing court must examine the entirety of the evidence to make that

analysis, *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho.257. 260, 715 P2e 927.(Idaho 1985)

In *Lundgren v. Freeman*, 307 F2d, 104, a Ninth Circuit Court of Appeals decision, the Court stated, "...Rule 52(a) seems to have been designed to enable the appellate court to review the trial judge's finding of fact to see that justice has been done." ... *****. Rule 52(a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not be construed to encourage appeals that are based on the hope that the appellate court will second-guess the trial court"

A finding is said to be "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed... This rule applies to documentary and undisputed evidence. *U.S. v. U. S. Gypsum Co.* 333 U.S. 364, 395, 68 S. Ct. 1190, 363 U. S. 278.

IV.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW PREPARED BY RESPONDENT, AND RUBBERSTAMPED AND ADOPTED AS THE DECISION OF THE TRIAL COURT CONTAIN CERTAIN FINDINGS OF FACT WHICH ARE IRRELEVANT AND NOT COMPETENT EVIDENCE FOR THE DETERMINATION OF ANY MATERIAL ISSUE IN THIS CAUSE. THE CONCLUSIONS OF LAW THUS ADOPTED BY THE TRIAL COURT FAIL TO PROPERLY APPLY THE PROPER LEGAL STANDARDS TO THOSE FINDINGS ADOPTED BY THE COURT WHICH ARE RELEVANT AND ARE SUPPORT BY THE EVIDENCE..

This case was pled and tried on the theory that the Nancy was unjustly enriched by Charles' improvements placed on her property at his expense and with her consent.

The elements that Charles was required to prove, and did prove, to recover under the theory of unjust enrichment are:

> "(l) There was a benefit conferred upon the Defendant by the plaintiff;
> (2) Appreciation by the defendant of such benefit; and
> (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof."
> *Aberdeen-Springfield Canal Co., v. Peiper,* 133 Idaho 82, 88, 982 P.2d 917, 923 (1999).

Many of the findings adopted by the Court seem to pertain to the defenses underlying theory of this case referred to above In practical effect they created a smoke screen and diverted the Court from the real issues of this cause.. Little or nor attention was given to the Pre-litigation conduct of Respondent as compared to her litigation time testimony, which are in contrast conflicting.

In these respects, it is here contended, that applying an objective reasonable trier of fact standard to the evidence accepted by the Court in this case that the certain Findings of Fact are irrelevant and therefore do not rise to the level of Finding supported by substantial evidence competent evidence. Those findings are, therefore, clearly erroneous should be set aside.

We question whether trial courts decision was an application of an objective standard, or whether it was an application of the trial courts experience with the mainsprings, of human conduct to the totality of the facts of this case While we cannot

speak to the possibility of the prejudicial bias of the court, it is clear, the Court was influenced by irrelevant evidence, which had no significant relationship to prove, or disprove the elements of unjust enrichment. This patently clear from the Courts to the letter adoption of the findings and conclusions prepared by the Defense and by his acceptance of manner in which they were drafted and the evidence upon which each finding was supported .This evidence is reflected in the following numbered findings of the Court:. His adoption of the Defense's findings of fact and conclusions of law was an endorsement of the defense view that this was Nancy's property and Charles had not claim. In law or equity.

We will endeavor to clarify this argument further by reviewing the findings at length

Finding of Fact number 2. "The defendant is a single, divorced mother. She has worked for Snyder's Automotive in Paul, Idaho in the auto parts business for more than ten years. Her average annual earnings have been approximately $40,000.00 since 2001." Given the elements listed above, it is hard to see where the place, length of employment and her average annual earnings are relevant to these proceedings.

Finding of Fact number 4. "In the middle of 2000, Don Suhr advised the defendant that she would need to find another home, because he wanted the home for his son. There was some testimony that Don Suhr did not like the plaintiff, nor the way that plaintiff treated the defendant." What relevance does any testimony about Don Suhr, who is Nancy's brother, and did not testify, have to this case? This is hearsay at the least, and again, it is not relevant to prove any fact of consequence and is incompetent as to the elements in the case at hand. Statements like: "There was some testimony....." is not a fact at all and has no place in findings by a competent Court of Law.

Finding of Fact number 9. "The defendant paid all of the mortgage payments, all of the property taxes, all of the utilities, and all of the irrigation water assessments on her property from the time she purchased it until she sold it. She also provided most of the groceries for the household. She wanted to prove that she could care for herself and her children as a single mother." There is no dispute about the fact that Nancy bought the property as a sole and separate person. Nancy's own testimony indicated that Charles helped with the groceries (Tr. p. 329, L. 10) The court fails to mention he paid at least some of her water bills. (Tr. p. 343, L. 16 & 17). The court fails to note that Charles spent an average of $600 dollar a month on Groceries and that he used practically all of his earning to provide for the family and the improvements on the property. It should also be remembered that Nancy had three of her children living there as well as herself. The court paid not attention to this fact. Thus this finding is inconsistent with the evidence adduced at trial. However, this Finding was primarily about making Charles look like a freeloader and is simply not relevant to the elements of the case that was before the Court. This finding ignores the agreement they had both express and implied when Nancy bought the property upon which the barn was Built (Tr, p 328 L10-24)

Finding of Fact number 10: "For a number of years before 2001, the plaintiff had wanted to build a horse barn for his race horses. Defendant had not acquired real property of his own on which to construct one." Again, the language, as drafted by the defense, and adopted by the court was designed and intended to demean Charles' character. The court ignored and failed to note Charles testimony that he was preparing to build the barn on property his folks had set aside for that purpose( Tr. p 28, L 12-21) It is beyond dispute , Charles built the Barn and paid all of its cost.. He built the barn on Nancy's

property with her consent ,or we wouldn't be before the Court at this time. However, the testimony was undisputed that Charles had barns and corrals and horse equipment at his parent's home, only 1 ½ miles away. (Tr. p. 25, L. 15-20).

Finding of Fact number 11: "The plaintiff does not maintain financial records for his business. He could or would not show what income he earned while he lived with the defendant." Nowhere in the elements set forth by this Court for recovery under unjust enrichment, is there a requirement that any party produce their financial records. This finding does not refer to evidence that was proof of any fact of consequence This court held in *Gillette v. Storm Circle Ranch*, 101 Idaho 663, 619 P.2d 1116, (1980). The measure of damage is not necessarily what had been spent. So what relevance does maintenance of records have? Further More, here again the paid not attention to the fact that the receipts for expenditures were all left with the Respondent and unavailable to Charles at the time of trial.( Tr p 146, L 19-20), incompetent and irrelevant.

Finding of Fact number 12: "In the spring of 2001, the plaintiff started showing the defendant drawings of a horse barn he wanted to build. The defendant told him that she did not want him to build a horse barn on her property, partly because she did not want him to later assert any claim to any interest in her property."

This finding brings into focus an argument made by Appellant in the Trial Court relative to the rights of parties engaged in a meretricious relationship to recover for contributions made in improving the real property belonging to one of them.

We presented that argument out of concern that the court below might be mislead by the view that unmarried persons can acquire no interest in the property of the other, and therefore , that they may have no cause of action. It was Appellant's perception that

was the real substance and scope of the defense. This was particularly relevant, we thought, because of the contentions of the Defendant in the court below..

Because we were unable to find Idaho precedent on this issue, in Appellant's pretrial Memorandum and , in his post trial memorandum appellant argued this issue to the court to out of concern that the court might not afford equitable relief in this cause. . In support of this argument Appellant cited the Arizona decisions *Cross v. Cross, 381 P2d 673, (Arizona , 1963)* and the California decision in *Marvin v. Marvin,* 557 P2d 106, (Cal. 1976).

In The *Cross* case the Arizona Supreme court determined that a marriage of the parties to that action was invalid. Thus neither party could acquire property rights based upon the marital status. That court however, applying the equitable doctrine of restitution stated at page 575:

> "We do not imply however, that appellee has no claim for labor and money contributed during the course of the purported marriage which enriched appellant. The evidence shows appellee used her personal funds and labored to improve appellant's real property. Based on general principles of law and equity and without resort to the existence of the marital status she may recover the value of these contributions . The fact of a meretricious relationship does not bar appellee's claim for contribution of funds and labor performed in improving appellant's property during this relationship." Citing *Garza v. Fernandez* (Ariz.) 248 P2d 869"

The *Marvin* case, supra, was cited to the court primarily for its holding at page 121:

> "We need not treat nonmarital partners as putatively married persons in order to apply principles of implied contract or extend equitable remedies; we need to treat them only as we do any other unmarried persons"
> and the statement "There is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift; in any event the better approach is to presume, as Justice Peters suggested,

"that the parties intended to deal fairly with each other" *Keene v. Keene*, *** 371P2d329, 339(dissenting opinion)****""

The California Supreme Court in *Marvin* , supra, noted in its decision the changing mores of society and the acceptance of non-marital cohabitation between men and women which has been so widely accepted. Clearly, just as in this case, people enter into such relationships and assume either by agreement or by implication duties to each other similar to those extended to each other in a marital relationship.

Although this cause was tried on the theory of Unjust Enrichment, many of the courts findings, seem to be framed with the perception that the defendant had no right to make a claim. Particularly because they are in conflict with the evidence. For example:

: Respondent said she made it clear to Chuck she was an "independent woman and did not need him". Clearly , this lady, realized the beneficial value that the barn as planned and the other improvements would have in advancing the value of her property. She knew no community property interest could be acquired because the legislature had abolished marriage by Common Law.(Tr. pp243, L.3-9). If her statement is believed then the inference arises from her conduct that she consented to the building of the barn and other improvements on the basis she asserted in her testimony as a form of enticement, realizing the advantage she would gain at the expense of this appellant.

Her conduct at time of the construction of improvements demonstrated she was in total approval.(See Tr. p 24 L1-7, p 25 L19-20, p27 L10-15, 23-25, p 28 L 1- 25) In her trial time testimony she admitted she was in total approval, so long as no claim could be asserted against the property. ( Tr.243, L 12-16.)

Appellant has not made a claim against her property. The remedy he seeks is equitable in form only. His contribution to the improvements contributed substantially to the benefits she received. It is unfair and unjust and inequitable that he should be denied compensation for the benefit respondent has received from his many contributions to the improvement of the property. In proper sense, what he seeks is only to recover what he has contributed to her benefit.. He wants nothing of her property. It simply is unfair and unjust that she should retain the benefit he has conferred on her..

The court's Findings and Conclusions however, infer Chuck, because he did not pay for utilities, water, taxes on the property, and despite his contributions to the improvements, is not entitled to recover, the value of the benefit conferred upon her.

In finding no 8, the court lists the improvements made by Nancy. No mention is made of the quality of the workmanship, nor the materials used. However in contrast to that, the court took pains to adopt the findings prepared by the defense verbatim which attacked every conceivable aspect of the construction, even to the degree of criticizing the failure to install coral post with GPS accuracy. In finding no.8 the court failed to distinguish the changes made by Nancy which were clearly maintenance. For the court to suggest that those improvements enhanced the value of the Respondents property by $80,000.00 makes little or no sense, unless it is considered the court deemed that Chuck was entitled to no recovery because he had no interest in the real property by reason of their relationship .

Nancy's conduct in the early stages of their relationship is inconsistent with her trial time testimony. This went unnoticed by the court in his rubberstamped finding of fact. She was interested in having a place for her children to have chores. She wanted to have

calves and she bought ponies for her children. She needed the barn, the corrals and the fences, she knew Charles did not need the barn. He had an adequate place to house and train his horses, one and one-half mile away at his parent's farm. She wanted Charles to have the horses at her place to house and to train them, she attended chariot races with him. She invested in a racing horse and bought ponies with Mr. Schultz. She needed the barn and the improvements

Although she needed only to tell Chuck "no" to the building the barn, she approved its construction. She helped him build it, she never complained about the quality or the esthetic appearance, of the barn or the steel posts that were used to build a permanent corral or that some of material used were recycled materials.

This lady who had been twice divorced, experienced as she was, knew and realized the value of these improvements to this piece of fixer-up property she bought, and she obtained these improvements without cost to her. Her trial time testimony is overshadowed by her pre-litigation conduct We respectfully submit, an objective application of the fact finding process would demand the court consider her prelitigation conduct as it contrasted with her litigation time testimony.

After the improvements were complete, and there was no longer a major improvement to be constructed. She demanded that he pay a water charge to the Irrigation company which she told him he would not have to do. And even though he reacted, he paid the charge, then she demanded his removal. She had obtained from him all that he was able to contribute to her. She was ready to move on.

Finding of Fact number 13: "After numerous requests from the plaintiff, the defendant consented to allow the plaintiff to build the horse barn on her property on the

condition that the plaintiff would not acquire an ownership interest in the defendant's property." The same objections as in Finding of Fact number 12 apply here. This is not relevant and Nancy's actions speak louder than words.

The court failed to note Nancy's inconsistent testimony on this point. In her initial testimony she testified to two conversation about building the barn.. One in the spring of 2001 (Tr.P 240, L17-25;241, L 1-20, 243 L 3-9) . The second conversation occurred at an undisclosed time after that. (Tr. p 243, L 11-19) She said; He came to her again and she consented to him building the barn, but she reminded him that the property was hers. She did not mention on this occasion that she had been worn downs to get her consent..

Finding of Fact number 14: "Prior to 2001, the plaintiff began accumulating material for a horse barn. He had acquired two used 10' X 16' modular buildings the sugar company had used for migrant labor housing. The plaintiff brought them to the defendant's property to use as a tack room and feed room for the horse barn." The measure of damage was the benefit received for which compensation was required. Nothing in the case law we have been able to find requires that the benefit be constructed brand new. This finding was nor relevant.

Finding of Fact number 15: "The plaintiff bought used corrugated panels for siding on the barn from the defendant's brother. He salvaged abandoned steel water lines from a farm formerly owned by the Simplot Company and cut them to use for corral posts. The plaintiff purchased cull dimensional lumber and odd sized pieces of plywood for construction of the barn." To make a prima facie case of unjust enrichment does not require that the materials be new and certainly doesn't specify who the materials were purchased from. This has no relevance to the determination of the measure of damage. It

speaks only to the disappointment Nancy had that she did not get more. Irrelevant and immaterial to this case.

Finding of Fact number 16: "The plaintiff used a post hole digger to dig the holes for the pressure treated lumber he used as vertical columns in the barn and to dig post holes for the corral posts. The post holes were not uniform in depth. In some instances, the plaintiff broke through hardpan and had to refill the holes. No concrete was used to prove footings or a foundation for the vertical member of the barn or the posts." How Charles built this barn is simply not relevant. Monty Arrossa and Tom Blaney both testified the barn was average or above average for the area and suitable for horses. The purchaser's of the property both testified the barn and corrals were what attracted them to the property in the first place and why they paid as much for the property as they did.

Finding of Fact number 17: "The plaintiff used slab sides of logs to build a wind break on the east side of the property. It was not visually attractive and it had deteriorated by the time the plaintiff left the property in 2008." The only relevant part of this finding is that a Wind break had been constructed by Charles. The rest of it is irrelevant information intended to mislead the court into believing that this somehow makes Charles appear bad. It has absolutely nothing to do with the measure of damage. If it was offered to show that she did not appreciate the benefit, it would have been more relevant for the court to find that when she first offered the property for sale she was asking $150,000.00 . or more. Obviously, she knew and appreciated the value of the benefit Charles had conferred to her.. (Tr. pp 293, L13-14. except as indicated this finding is essentially irrelevant..

Finding of Fact 18: "The plaintiff has no records of the new material he purchased to use in the barn." There simply is no requirement that he produce records and absolutely no legal requirement that the material be new. Irrelevant.

Finding of Fact 19: "The roof for the barn and a cover for the pump house was used roofing material from the Cassia Hospital purchased from Les Schultz. Nothing about this finding is relevant to establish any material fact in issue

Finding of Fact 20: "The layout for the horse barn was good for its intended purpose. It was safe for horses and according to a veterinarian and a horse trainer who testified at the trial." Finally, a finding that is relevant and competent to the issue of the creation of a benefit created by Charles.

Finding of Fact number 21: "Aesthetically, the horse barn, corrals, and windbreak were not pleasing to the defendant, because of the quality of the material and workmanship." Nancy may not have liked the barn and so forth, but she certainly was willing to accept the doubling of the value of her property because of it. Counsel is unable to find any requirement that the benefit be "esthetically pleasing" to the beneficiary.

Finding of Fact number 22: "The plaintiff helped the defendant clean up around the property when she bought it, but he left a mess for her to clean up when he left. The mess included boxes of used horseshoes, broken gated pipe, old tires, and used lumber." What does that have to do with whether a benefit was created, appreciated and whether it would be unjust or inequitable for her to keep it? Any relevancy in this finding is not readily apparent.

Finding of Fact number 23: "The plaintiff did not pay rent for the use of the defendant's home during the five years he lived there. Likewise, he did not pay rent, irrigation assessments, or utilities for the use of the land he used for pasture, barn and corrals." This Finding is simply a rehash of Finding of Fact number 9, and like Finding number 9 it has no relevance to the case or issues on trial. Indeed it is contrary to Nancy's own testimony (Tr. pp 13-20.)

Finding of Fact number 24: "In April of 2006, when the A & B Irrigation District's water bill was due, the defendant asked the plaintiff to pay the water bill, because the water bill was supporting his hobby. The plaintiff threw his money clip at the defendant. She considered that to be a threatening gesture and told the plaintiff to leave. The plaintiff left the defendant's residence after that incident and the parties have not lived together since." In the first place, there was no testimony that the water bill was "supporting his hobby". In any event, this is apropos to nothing. Nancy is talking out of both sides of her mouth, since previous findings say she paid all of these bills. Charles did not pay rent because Nancy specifically asked him not to. (Tr. p. 328, 13-20) This, again, has nothing to do with whether a benefit was created, whether it was appreciated and whether it was inequitable for Nancy to keep the benefit without paying Charles therefore.

Finding 25: "After the plaintiff was ejected from the defendant's residence, the defendant acknowledged that plaintiff needed a place to train his horses for the upcoming chariot racing season. She told the plaintiff that he could continue to care for and train his horses on her property." This information has no relevance to the case.. The fact that Nancy is a nice person is not relevant either. However, this finding involve the issue

raised by appellant in his opening brief relating to the agreement Nancy and Charles had when they split. Appellant contends the Court improperly excluded the proof of the agreement . retaining the horses on the property was part of the consideration agreed to by the parties , along with Charles agreement to care for her ponies.

Finding 26: "That arrangement continued from May of 2006 through mid-2008, during which time the plaintiff did not pay any rent, irrigation assessments, or utilities for his use of the land." Same argument as Finding number 9 and 23. Not relevant or competent to prove or disprove the assertion at hand.

Finding 27: " The plaintiff did, however, continue to use the house and bathroom without permission while the defendant was away. After being told that he could no longer use the bathroom, the plaintiff brought a 19th century style outhouse to the property without permission." The finding is totally irrelevant to this case.

Finding of Fact number 28: "In the summer of 2008, the defendant sold a team of miniature ponies she had purchased with Les Shultz. Through a mistake in identification of the ponies, the buyer picked up one of the plaintiff's ponies instead of the defendant's pony. The parties resolved those unpleasantries through Minidoka County deputy sheriff Dan Kindig. The buyer returned the plaintiff's pony and the defendant instructed the plaintiff to remove his remaining livestock and possessions from her property." Nothing, nothing at all in this Finding, has anything at all to do with the issues in this case. It is once again, inflammatory rhetoric used to paint the Appellant in an unflattering light.

Finding of Fact number 30: "The defendant told the plaintiff he could remove his horse barn and corrals from the premises. He considered a plan to move them to Joanna Erickson's place, but he did not pursue that plan." This finding simply defies logic, not

to mention the case law made and provided in such cases dealing with fixtures to real property. These structures took over a year build and required the help of others. To honestly believe that Charles could move all of this is simply ludicrous. This also applies to Finding of Fact number 31.

Finding of Fact No. 38: "The plaintiff provided no evidence to show the value of the property when the defendant purchased it, the amount of any value increase that would be attributable to market forces, or the amount of any value increase that would be attributable to the construction of the horse facilities." The value of property is what a willing seller will sell it for and a willing buyer will pay for it. Nancy testified what she paid for the property when she purchased it. (Tr. p. 16, L. 4-17). See also Plaintiff's exhibit 1. Nancy testified what she sold the property to the Pereiras for. (Tr. p. 18, L. 4-15). After paying off the mortgage on the property, Nancy pocketed $62,545.40. Finding of Fact number 7 sets that all out as well. There is a conflict even within the Findings of Fact in this case.

We respectfully submit that the standard for determining the benefit in this cause that applied by this Court in *Nielson v. Davis* , 96 Idaho 314, 528 P2d 196 (Idaho 1974). In this case the value of property before the improvements, giving Nancy the benefit of closing costs $62, 522.79. This was a transaction between a willing buyer and a willing seller. She sold the Property for $130,000.00 and after deducting closing costs and the encumbrance she netted $ 62, 545.40. This sale was between a willing seller and buyer willing to buy only because of the improvements on the property, Appellant testified in his opinion that sum should be divided equally between them (Tr. pp123, L20-25, 124,

L1) The , *supra,* determination of deduct the sale price from the value of the property before i9t was improved less the encumbrance upon the property. This rule we believe to be the proper measure of damage in this cause, giving credit to Nancy for the value of improvements made by her which may have enhance the value of the property..

Finding of Fact number 39: "The plaintiff presented no testimony to establish that the defendant received a better price for the property with the horse barn and corrals than she would have received without them." The Pereiras testified clearly that they would not have bought the property without the barn and corrals. This is admitted in Finding of Fact number 37.. This finding is directly contrary to the evidence. This property was shown 6 time by the realtors with no takers. Finally , Periera's buy only because they need the improvements. The finding is not supported by the evidence.;

Finding of Fact number 40: "The plaintiff suggests that the property sold more quickly because of the horse facilities, but provided no testimony or evidence to establish such an economic benefit to the defendant." This finding seems to indicate that if the property sold more quickly because of the barn, it would be considered a benefit. The testimony in this case, was that the Pereiras would not have even looked at this property seriously, had it not been for the barn and corrals. (Tr. p.39, L. 18-21; p. 41, L. 16-19; p. 44, L. 9-10; p. 50, L. 11-13; p. 51, L. 12-17).

Finding of Fact number 41: "There is no evidence in the record which establishes that an economic benefit was conferred on the defendant by the plaintiff." Here again it is submitted the formula applied in Neilson v. Davis supra is controlling. The evidence does not substantially support the finding. Counsel would argue that if "economic benefit" means what it says, then it is clear that the barn and corrals, placed upon Nancy's

property by Charles was the primary reason that Nancy's property sold for double what she paid for it after only 6 years. The Perieras, the willing buyers, who had nothing to gain or loose by their testimony either way here, unequivocally stated that they were first attracted to Nancy's property after seeing the advertisement that told about the six stall horse barn. That they would not have bought Nancy's property without the barn and other improvements placed there by Charles. "If there was nothing on it besides the house I would not (have bought the property)" (Tr. p. 52, L. 17-18.) See also cited Tr. and page numbers above in Finding of Fact number 40 for additional testimony of the Perieras confirming the importance of the barn to their decision to buy this property.

Finding of fact no. 42.

The Courts adoption of the respondent's draft of this finding is unfair, and, this court should examine that finding against the following evidence all of which is contained in the findings we have reviewed above.

1. The Court stated she appeared reasonable and was slow to offer damaging facts against the defendant,. We believe if the court will examine this record , the court will find that the exact opposite is the fact. Charles was totally without criticism of Nancy.

This court needs only to consider her criticism of Charles demonstrated in the findings discussed herein which are obviously an attack on Charles' character. The finding, were prepared by respondent. In almost every way they reflect an effort to demean Charles in one way or another. .

2. The Court failed to make note of the fact that Respondent was testifying from notes. At Tr. p. 344, L5-22, the Court refused to allow counsel for Appellant to see those

notes and ordered them handed to Mr. Chisholm. It appeared to counsel that she was testifying from prepared notes and not answering from her memory of the events. Although counsel asked to see the notes, the court refused to allow that.

3. Charles did not testify from notes and he was not critical of Nancy in any way, shape, or form.

SUMMARY AND CONCLUSION

Appellant in this cause brought this action to try to recover for the substantial benefit he conferred on Respondent by the costly, extensive improvements he made upon her property. Even if she conditioned her consent upon him not getting an interest in her property by the construction of the improvements, Appellant did not and does not seek any interest in her property. His claim is for restitution.

When the relevant facts are threshed from those that have no relevance, appellant has proved with reasonable certainty that:

1. These parties undertook to cohabit in an un-married state.
2. Nancy bought property upon which there was a home.
3. The property was rundown at the time of purchase
4. Nancy paid, including closing costs, $62,522.79.00 for the property
5. Nancy made some improvements to the property
6. Charles, Charles made major improvements to the property
7. The improvements made by Nancy were miniscule compared to those made by Charles .
8. Without laboriously listing the improvements, the major improvement of Nancy was the construction of a deck and the closing of the foundation. and installing

Pine board interior. The Improvements made by Charles included the construction of a six stall horse barn, accompanying corrals , fences, water and electrical line to the Home and the Barn and corrals.

9. Charles did most of the cleanup of the place after purchase, He hauled 800 yards of dirt to level the yard and fill a huge whole in the yard. He installed an irrigation system, removed a forest of mature Russian olive trees and did many other improvements and things for Nancy at his entire expense.

10 Nancy sold the property during depressed time, for $130,000.00 After paying closing costs and an outstanding encumbrance there was a net gain of $62,545.40

Charles felt the equitable adjustment required giving Nancy credit for what she did and him for what he did, and proposed and equal division.

It is Appellant's contention that the formula applied by the Court in Nielson v. Davis supra. is the most fair approach for determining the measure of the benefit conferred, taking into consideration that Nancy should be given credit for her improvements that enhanced the property value

Whether the Court in this cause was influenced by thought that no cause of action really exist in Idaho for equitable relief in such cases or not, which we believe is the underlying theory for the defense in this case) , we strongly urge the court to reject the the decision which in effect compels the Appellant to forfeit his time, labor, money expended and material furnished. On the basis of irrelevant rubberstamped findings of fact. Such findings are not findings which an objective trier of fact should accept and rely on to make a decision that has the impact this decision has had on Appellant

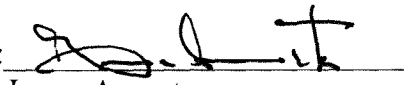
In many instances the findings of court are patently wrong. Such findings are clearly erroneous and should not be upheld..

In this case the relevant evidence, and those finding based upon relevant evidence is for the most part undisputed, and not conflicting. This evidence and these findings as stated above point to only one conclusion. That conclusion is that, Charles by making the many improvements on Nancy's property conferred upon her valuable benefits, which she accepted, knowing and appreciating the value of the benefit. That it would be inequitable, unfair and unjust for her to retain all of the benefit without compensation to Charles.

For the reasons stated Appellant respectfully requests that the decision of the trial court be reversed and that this case be referred for a new trial.

Respectfully Submitted,

Annest Law Office

By: 
James Annest

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of September, 2011, I served a true and correct copy of the foregoing Appellant's Reply Brief upon:

Donald J. Chisholm
Chisholm Law Office
P.O. Box 1118
Burley, Idaho 83318

Attorney of record in the above-entitled matter, by mailing a copy thereof in the United States mail, postage prepaid by first class mail, in an envelope addressed to said person at the foregoing address.

James Annest

## *APPENDIX*

1. Plaintiff's Exhibit 3 A

2. Plaintiff's Exhibit 8 B

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PLAINTIFF'S EXHIBIT 3-A

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